No. 95-961

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ED K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

BROOKE A. NIELSEN
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TABLE OF CONTENTS

PAGE

Table of Authorities ii

I. The Issues Presented for Certiorari Review were Preserved in the Lower Court and are Properly Presented in the Instant Petition. 1

II. The Type of Error Found to Exist by the Circuit Court is Reviewable Under the Brecht Standard. 7

Conclusion 10

Appendix P

Appendix Q

Appendix R

Appendix S

Appendix T

Appendix U

TABLE OF AUTHORITIES

PAGE

Bennett v. State,
787 P.2d 797, *cert. denied*
498 U.S. 925 (1990). 9

Brecht v. Abrahamson,
113 S.Ct. 1710 (1993). 1-4, 8, 9

Castro v. State of Okl.,
71 F.3d 1502 (10th Cir. 1995). 9

Chapman v. California,
386 U.S. 18 (1967). 1, 4, 5, 9

Clemons v. Mississippi,
494 U.S. 738 (1990). 6

O'Neal v. McAninch,
115 S.Ct. 992 (1995). 4

Rice v. Wood,
1996 WL 69838 (9th Cir.,
Wash., Feb. 20, 1996). 8

Rose v. Clark,
478 U.S. 570 (1986). 9

Smith v. Dixon,
14 F.3d 956 (4th Cir. 1994). 2

Tyson v. Trigg,
50 F.3d 436 (7th Cir. 1995). 8

Williams v. Clarke,
40 F.3d 1529 (8th Cir. 1994) 4

Yates v. Evatt,
111 S.Ct. 1884 (1991). 5

I. The Issues Presented for Certiorari Review were Preserved in the Lower Court and are Properly Presented in the Instant Petition.

Most of McKenna's argument opposing review of the State's petition is devoted to grossly misleading claims that the harmless error issues were not preserved below. McKenna has chosen to indulge in a course of selectively ignoring the record in crucial respects and at best, misciting the record when it suits him. Understandably, faced with what he begrudgingly concedes to be "apparently inconsistent authorities" among the circuits on the substantive issues presented (Opposition Brief, p. 5)(hereinafter "OB"), McKenna apparently has chosen to mislead the Court in the hope that this Court will not review the merits of the issues presented because of alleged procedural shortcomings. The Court should reject his erroneous arguments.

Essentially, McKenna's Opposition Brief accuses the State of "sandbagging" the lower court and McKenna in several respects. (OB, p.5). He asserts that the State never argued that the federal court should engage in a harmless error analysis (OB, p.2); that the State only contended that the holding of *Chapman v. California*, 386 U.S. 18 (1967) rather than *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993) applies (OB, pp. 3 and 15); that the State never cited certain cases,

including *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994) which demonstrate conflict on the harmless error issue (OB, p. 4-5); that the State only cited *Brecht* with respect to other issues, not with respect to reviewing a death sentence after an aggravator is eliminated (OB, p. 4); and that the State urged the circuit court only to let the state courts act first through a process of certification as to whether the Nevada Supreme Court would affirm the sentence through either a reweighing process or a harmless error review (OB, p. 6). A close review of the state's briefs and pleadings demonstrate otherwise.

In its first brief, filed on August 9, 1993 in the circuit court, the State made the following argument:

> Rather than sustaining the decision of the lower court and thus requiring a new sentencing hearing or alternatively rather than certifying the case to the Nevada Supreme Court, as suggested in the previous argument section of this brief, the State submits that this court may independently review the record and conclude that any error was occasioned by considering the depravity of mind aggravating circumstance, it was harmless beyond a reasonable doubt.

(Respondents/Appellants/Cross-Appellees' Opening Brief, pp. 25-26). Thus, the State put the circuit court on notice that its alternative argument was that independent review of the record by the circuit court for harmless error was appropriate.

In its next brief, filed on December 7, 1993, without limitation on the scope of *Brecht* as the governing standard of harmless error review in collateral proceedings, the State cited to *Brecht* in the context of rebutting McKenna's arguments that his right to post-arrest silence had been impinged substantively and because of his trial counsels' collective ineffectiveness. (Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief, pp. 19, 28, 30). Thus, although not context specific, the circuit court was put on notice of the general standard announced in *Brecht* pertaining to collateral review.

Then, on April 8, 1994, while the case was still pending, the State submitted the first of several similar documents (*see* Appendices P through U), each of which was entitled "Notice of Supplemental Authority Filed Pursuant to FRAP 28(j)." In pertinent part, the notice stated,

> On January 21, 1994, the United States Court of Appeals for the Fourth Circuit issued a en banc opinion in *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994). The opinion addresses an issued [SIC] raised by the state respondents on pages 2 through 8 of the brief referenced above, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error. The circuit court held that a federal appellate court can and should make a harmless error determination under the standard set forth in *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct.1710 (1993), even absent a harmless error

> determination by the state courts. *Smith*, 14 F.3d at 976.

See also, Appendix T (Post argument Notice of Supplemental Authority citing the holding in *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994), which rejected assertion that initial harmless error review could not be performed by federal courts but applying *Chapman* rather than *Brecht* standard).

Thus, before the oral arguments in the circuit court, and contrary to McKenna's incorrect analysis, the State expressly notified the circuit court of at least two relevant, albeit unharmonious holdings on the very issue now before this Court. Then, several months after oral argument in the circuit court, the State submitted another Notice (Appendix U) alerting the panel to this Court's recent holding in *O'Neal v. McAninch*, 115 S.Ct. 992 (1995) and asserting that

> [T]he respondents contend that the alleged trial errors discussed in the sections noted above do not constitute reversible error under *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct. 1710 (1993), as refined in *McAninch, supra*, at___.

While cited specifically in the context of the State's *Doyle* error arguments, the State never conceded or limited *Brecht's* applicability to other issues. Surely, the circuit court should have been no less compelled to review whatever constitutional errors it found under some standard of harmless

error review since the limitation on federal habeas relief to serious errors was established well before McKenna's case arrived in the circuit court. *Yates v. Evatt*, 111 S.Ct. 1884, 1994-95 (1991) (applying harmless error test of *Chapman* "in the first instance" to burden shifting jury instruction).

Here, there was no effort on the part of the circuit court to assess the impact of the error it found under any standard of harmless error review. The responsibility for that deficiency should not be visited upon the State since the circuit court was specifically informed of the State's view that whatever error had occurred was harmless. A fair reading of the numerous notices submitted by the State should lead this Court to the conclusion that the State made every effort to keep the circuit court apprised of both state court and federal court decisions bearing on McKenna's case.

The State does not dispute the fact it has consistently asserted in the district court and the circuit court that the preferred course of action would be for the federal courts to certify certain questions regarding the outcome of reweighing and/or harmless error in McKenna's case to the Nevada Supreme Court. Both the district court and the circuit court rejected the State's suggestion even though McKenna conceded that certification would be a proper course of conduct. The

circuit court then chose its method of disposition, i.e., ordering a new sentencing proceeding, thereby precluding the Nevada Supreme Court from conducting a review under *Clemons v. Mississippi*, 494 U.S. 738 (1990).

The circuit court did so without resort to a common vehicle for analysis of habeas cases, that is, asking the simple question: If we find that federal constitutional error occurred, can we also say that the error was not harmless? Notwithstanding McKenna's fanciful suggestion to the contrary, the State made reasonable efforts to get the issue decided and was rebuffed in its attempts. Having totally foreclosed the State from doing anything other than conducting a new sentencing hearing it should come as no surprise to either the circuit court or McKenna that the State is not content to passively accept a decision that never even addressed whether the error is harmless or something more.[1]

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[1]McKenna cryptically refers to the availability of any "particular forms of resentencing" (OB, p. 13) as an irrelevant consideration in deciding the issues before the Court. This is more than passing strange given the fact that the federal court's ruling has overturned a death sentence found to be permissible in the state court system. One would be hard pressed to cite a more concrete example of federal intervention causing friction between the state and federal courts. His argument bespeaks what McKenna fails to state candidly—if he can convince this Court to deny certiorari, the Nevada courts will be foreclosed from doing anything other than conducting a new sentencing hearing before a new trial jury. There will be no opportunity for the state courts to act once the federal court order requiring

II. The Type of Error Found to Exist by the Circuit Court is Reviewable Under the Brecht Standard.

To the limited extent that McKenna has chosen to address the substance of the State's argument that conflicts exist among the circuits, he makes several arguments remarkable only for their lack of controlling authority from any federal court, and all of which fly in the face of the holdings of the Nevada Supreme Court as well.

One argument is that by urging the federal courts to conduct harmless error analysis in the first instance, the State "stands the principles of federalism and comity on their heads." (OB, p. 13). To be sure, the Nevada Supreme Court (and presumably other state high courts as well) would prefer the first opportunity to correct possibly reversible error—when it is identified. The State urged that exact remedy upon the circuit court. Yet, the Ninth Circuit foreclosed that possibility here by finding error to exist and then automatically ordering a new sentencing hearing. The interests of comity are best served by requiring the federal courts to assess the harmfulness of the error before those courts overturn death sentences. As pointed out in the Petition for Writ of Certiorari, the decision of the panel in this case cannot be squared with its own circuit

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"resentencing" becomes final.

precedents much less those recent observations of other circuits, e.g.:

> [O]rdinarily...the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless error.

Tyson v. Trigg, 50 F.3d 436, 446 (7th Cir. 1995).

McKenna makes an unsupported argument that federal review of the error found here is "[I]n the weighing context, ...less like review of trial error subject to *Brecht* analysis and more like a structural error..." (OB, p. 11). The suggestion, devoid of so much as one citation to bolster it, is preposterous on its face.[2] Moreover, decisions rendered within the circuit and outside it just since the filing of the State's Petition only confirm what the State has pointed out—there is no principled way to defend the panel's decision in this case. There are few forms of structural error, even in capital cases. *Rice v. Wood*, 1996 WL 69838 (9th Cir., Wash., Feb. 20, 1996)(*en banc*

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[2]McKenna fails to recognize that even those federal jurists who have identified error in a capital sentencing context have not gone so far as to make McKenna's argument, that in a weighing state *Brecht* does not apply because it is not expressly mentioned in a *Clemons* type case, nor can it because of unbridled jury discretion even if mitigating circumstances do not outweigh aggravating circumstances. *Flamer v. State of Delaware*, 68 F.3d 710, 770 (Lewis, J., dissenting from denial of habeas relief where statute considered a "hybrid", but recognizing circuit conflict and concluding that *Brecht* standard applies).

holding that defendant's absence from jury's rendition of capital sentence is harmless error under *Brecht*, and *citing Rose v. Clark*, 478 U.S. 570 (1986), for the proposition that structural errors "are the exception and not the rule"); *Castro v. State of Okl.*, 71 F.3d 1502, 1516-17 (10th Cir. 1995) (court expressly disavows *Chapman* standard but nevertheless holds that lack of psychiatric assistance at trial, so called *Ake* error, is reversible trial error under *Brecht).*

Finally, McKenna argues that this Court should decline review in this case because it would be "extremely difficult" for this Court to decide the general issues in the context of what he characterizes as Nevada's "unbridled discretion" sentencing statute (OB, p. 12). Aside from the obvious response—this Court routinely decides exceedingly hard cases—the State notes that McKenna fails to recognize the import of controlling Nevada law on the issues before this Court.[3] His numerous citations to *Bennett v. State*, 787 P.2d 797, *cert. denied* 498 U.S. 925-26 (1990) do not change the

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[3]On January 8, 1996, this Court granted certiorari, vacated the Nevada Supreme Court's judgment in *Libby v. State*, and remanded for further consideration in light of *J.E.B. v. T.B.* (citation omitted), a jury selection case involving gender based peremptory challenges. *Libby v. Nevada*, 116 S.Ct. 691 (1996).There is no indication from this Court's disposition that the portion of the state court's holding in *Libby* pertaining to reweighing or conducting harmless error analysis is problematic.

Nevada Supreme Court's basic analytical framework for cases where invalid aggravators exist—some cases warrant completely new sentencing hearings and some do not. In the latter category, harmless error review can and should occur. (*See* Petition for Writ of Certiorari, pp. 13-15, for analysis of state court opinions).

CONCLUSION

This case begs the questions McKenna does not want answered—whether and what form of harmless error review should apply. McKenna cannot refute the existence of a serious conflict of opinions among the circuit courts as to the applicable standard of harmless error review in the context of an initial federal court finding of an invalid aggravating circumstance in a weighing state. The Court should grant the State's Petition.

Respectfully submitted.

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

BROOKE A. NIELSEN
Assistant Attorney General
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APPENDICES

APPENDIX P

April 8, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-00001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On March 31, 1994, the Nevada Supreme Court entered an Order Denying Rehearing in Canape v. State, 109 Nev.

864, 859 P.2d 1083 (1994), which is cited and discussed in Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief (filed December 7, 1993) at pages 4 through 7. For the convenience of the court and opposing counsel, I am submitting herewith a copy of the Order and the dissent therefrom by Justice Charles Springer.

On January 21, 1994, the United States Court of Appeals for the Fourth Circuit issued a en banc opinion in Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994). The opinion addresses an issued raised by the state respondents on pages 2 through 8 of the brief referenced above, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error. The circuit court held that a federal appellate court can and should make a harmless error determination under the standard set forth in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993), even absent a harmless error determination by the state courts. Smith, 14 F.3d at 976.

Please file this letter and return a file stamped copy in

enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls

cc: John Graves, Esq. (w/encs.)
Cal J. Potter, III, Esq. (w/encs.)
Inmate Patrick McKenna (w/encs.)

APPENDIX Q

June 7, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

RE: E.K. McDaniel v. Patrick Charles McKenna, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On May 31, 1994, the Nevada Supreme Court rendered an Opinion in Pertgen v. State, ___Nev.___, ___P.2d___

(1994). For the convenience of the court and opposing counsel, I am submitting herewith a copy of the Opinion. The Opinion addresses an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:td
cc: John Graves, Esq. (with enclosure)
Cal J. Potter, III, Esq. (with enclosure)
Inmate Patrick McKenna (with enclosure)

APPENDIX R

October 4, 1994

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

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Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On September 29, 1994, the Nevada Supreme Court rendered Opinions in Lane v. State, ___Nev.___, ___P.2d___ (1994); and Smith v. State, ___Nev.___, ___P.2d___ (1994). For the convenience of the court and opposing counsel, I am submitting herewith a copy of each Opinion. The Opinions address an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Additionally, an en banc panel of this court rendered an Opinion in Jeffers v. Lewis, ___F.2d___, Slip. Op., September 28, 1994, which also addresses the issue referenced in the paragraph immediately above. In fact, the three judge panel in this case entered an order taking this case out from under submission pending the decision in the Jeffers case.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls

cc: John Graves, Esq. (w/encs.)
Cal J. Potter, III, Esq. (w/encs.)
Inmate Patrick McKenna (w/encs.)

APPENDIX S

February 3, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

NOTICE OF SUPPLEMENTAL AUTHORITY
FILED PURSUANT TO FRAP 28(j)

Federal Rule of Appellate Procedure 28(j) states:

> When pertinent and significant authorities come to the the attention of a party after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the Clerk of the Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On December 2, 1994, the United States Court of Appeals for the Eighth Circuit rendered its Opinion in Williams v.

Clarke, 40 F. 3d 1529 (8th Cir. 1994). The case was published in the January 23, 1995 softbound edition of the reporter cited above. The Opinion addresses an issue raised by the state respondents on pages 2 through 8 of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief, that is, whether consideration of an invalid aggravating circumstance in Appellee McKenna's case should be considered harmless error or whether the state supreme court should be given an opportunity to reweigh the remaining aggravator against the purported mitigating circumstance.

Please file this letter and return a file stamped copy in the enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls
Encs.
cc: John Graves, Esq. (w/encs.)

FRANKIE SUE DEL PAPA
Attorney General
DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3538

Attorney for Respondents.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK CHARLES McKENNA,	Nos. 93-99001 93-99002
Petitioner-Appellee/ Cross-Appellant,	DC No. CV-90-785-PMP(LRL) **DEATH PENALTY CASE**
vs.	
ED K. MCDANIEL, et al.,	**AFFIDAVIT OF SERVICE**
Respondent-Appellant Cross-Appellee.	

STATE OF NEVADA)
: SS
CARSON CITY)

I, KATHY SCHULTZ, being first duly sworn under penalty of perjury do hereby state:

1. That I am an employee of the Office of the Attorney General, State of Nevada and that on this 6th day of

February, 1995, I served a copy of the foregoing Notice of Supplemental Authority dated February 3, 1995, by mailing a true copy as follows:

. . .

. . .

CAL POTTER
Potter & Associates
1125 Shadow Lane
Las Vegas, Nevada 89102

JOHN GRAVES
Graves & Leavitt
601 S. 6th Street
Las Vegas, Nevada 89101

/s/
Kathy Schultz

SUBSCRIBED AND SWORN to before me

this 6th day of February, 1995.

/s/
NOTARY PUBLIC
Cherril J. Adams

APPENDIX T

March 9, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Patrick Charles McKenna v. Salvador Godinez, et al.,
Case Nos. 93-00001 [sic] and 93-99002

Dear Ms. Catterson:

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FILED PURSUANT TO FRAP 28(j)

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Since the time of filing their last brief, an opinion has been rendered which has a bearing on the arguments made by the state respondents. Citations are set forth below.

On February 21, 1995, the United States Supreme Court

rendered its Opinion in *O'Neal v. McAninch*, ___U.S.___, ___S.Ct.___, 1995 WL 66598 (1995). The Opinion addresses an argument made by the state respondents on page 19, lines 14-26; page 28, lines 2-4; and page 29, line 25-28 and continuing through page 30, lines 1-9, of the Respondent/Appellants/Cross-Appellees' Joint Answering and Reply Brief. Specifically, the respondents contend that the alleged trial errors discussed in the sections noted above do not constitute reversible error under *Brecht v. Abrahamson*, ___U.S.___, 113 S.Ct. 1710 (1993), as refined in *McAninch*, *supra*, at ___.

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
Chief Deputy Attorney General
Criminal Justice Division
(702) 687-3538

DFS:kls

cc: John Graves, Esq. (with enclosure)
Cal J. Potter, III, Esq. (with enclosure)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 9th day of March, 1995, I served a copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY with attached Authority by mailing a true copy to the following:

John Graves, Esq.
GRAVES & LEAVITT
601 S 6TH STREET
LAS VEGAS NV 89101

and to:

Cal J. Potter III, Esq.
POTTER & ASSOCIATES
1125 SHADOW LANE
LAS VEGAS NV 89102

/s/

APPENDIX U

July 13, 1995

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: E. K. McDaniel v. Patrick Charles McKenna
Case Nos. 93-99001 and 93-99002

Dear Ms. Catterson:

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Since the time of filing their last brief, three opinions have been rendered which have a bearing on the arguments made by the state respondents. Citations are set forth below.

On June 28, 1995, the United States Court of Appeals for the Ninth Circuit rendered its Opinion in Bonin v. Calderon, ___ F.2d ___, 95 Daily Journal D.A.R. 8895 (9th Cir. 1995). The Opinion addresses an argument made by the state respondents on page 11, line 3 continuing through page 25, line 20, of the Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief. Specifically, the respondents contend that the alleged errors by McKenna's trial and direct appeal counsel discussed in the sections noted above do not constitute error under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) or reversible error under Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993).

Please file this letter and return a file stamped copy in enclosed self-addressed, stamped envelope. Thank you for your courtesy.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:_____
David F. Sarnowski
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